

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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AUG 14 1998

IN THE MATTER OF:

Implementation Of Section 255 Of The
Telecommunications Act Of 1996

Access To Telecommunications Services,
Telecommunications Equipment, And
Customer Premises Equipment By
Persons With Disabilities

WT Docket No. 96-198

REPLY COMMENTS OF MICROSOFT CORPORATION

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August 14, 1998

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Microsoft Corporation ("Microsoft") respectfully submits these reply comments in connection with the Commission's Notice of Proposed Rulemaking ("NPRM")¹ regarding implementation of Section 255 of the Telecommunications Act of 1996 ("the 1996 Act").²

I. MICROSOFT'S COMMITMENT TO ACCESSIBILITY

It is critical that people with disabilities have an equal opportunity to advance into the Information Age. Microsoft therefore commends the Commission's efforts to increase those opportunities in the telecommunications sector through this and a number of other proceedings, including those regarding telecommunications relay services and closed captioning. Microsoft believes that software plays an important role in creating opportunities for disabled persons in every facet of daily life.

¹ *Notice of Proposed Rulemaking*, WT Docket No. 96-198, FCC 98-55 (rel. April 20, 1998) ("NPRM").

Microsoft has been deeply involved in the area of accessibility since 1988, when it purchased a set of software add-ins called the "Access Pack" from the Trace Research and Development Center at the University of Wisconsin-Madison.³ Microsoft has continuously expanded the features of the Access Pack and has incorporated those features directly into Microsoft's Windows 95 and Windows NT 4 operating systems. As a result, every PC with Windows 95 or Windows NT 4 includes features specifically designed for individuals who have difficulty typing or using a mouse, who are deaf or hard-of-hearing, or who have moderately impaired vision. The Windows 98 operating system contains even more accessibility features, including an "Accessibility Configuration Wizard" that helps individual users adapt Windows' options to suit their needs and preferences. Windows 98 also includes a low-end screen magnifier that enables people with moderate vision impairments to work on their own or even unfamiliar machines (e.g., public-use machines at a library). Windows NT 5.0 will contain these same new features, plus others. Microsoft has also incorporated accessibility features into many of its other products; e.g., large icons and zoom text in its office productivity software, and closed captioning in its multimedia encyclopedia.

Microsoft has significant initiatives underway to simplify and promote third-party development of accessible software and hardware. Microsoft has developed and is continuing to improve a technology called "Active Accessibility" or MSAA. MSAA will standardize the way Windows-based PCs and adaptive hardware and software communicate with each other. Essentially, MSAA provides software "hooks" which software and hardware developers can

² 47 U.S.C. § 255.

³ The Trace Research and Development Center developed this technology with a grant from NIDRR (National Institute on Disability and Rehabilitation Research).

utilize to make their programs more accessible. Although still in its infancy, MSAA already helps companies make products more accessible without compromising their ability to innovate, and it allows manufacturers to create more effective accessibility aids. As the Access Pack has been, MSAA will be integrated into our operating systems so that all users, on any Windows-based PC, can benefit from this technology.

Microsoft also has included accessibility requirements as part of its "Designed for Windows" logo program; thus, promoting accessibility throughout the industry. The logo program sets out minimum requirements that software developers must meet in order to brand their products as "Designed for Windows." By incorporating accessibility requirements, we are attempting to raise the bar with respect to accessibility for both Microsoft and third-party developers.

Microsoft has made a strong commitment to testing its products in the disabled community. During 1998, Microsoft is integrating individuals with disabilities into every facet of our product design and development processes. We have formed independent Access Review Boards to help evaluate our products in the early design and development phases. We also will form a Disability Advisory Council composed of individuals with disabilities that will periodically consult with Microsoft to keep our efforts on track with the needs of individuals with disabilities. In addition, Microsoft has offered its resources to *other* software developers in order to expand the number of products available to people with disabilities.

II. DISCUSSION

All these achievements came without direct government mandate, enabling Microsoft and others to build upon these efforts continually, providing better and better tools for accessibility.⁴ We believe the demands of the high-tech marketplace can and should drive innovation in this important area. The software industry is one of the great success stories of our increasingly technology-driven Nation. New innovative software products are being developed at a rapid pace, with the overriding focus on improving ease-of-use and sophistication. The advent of ever more sophisticated, yet flexible software products can improve the lives of *all* Americans.

Nevertheless, there may be a limited area where by statute the Commission is arguably given a regulatory role. Specifically, assuming for purposes of this Reply that Section 255 has some application to software, Microsoft does not oppose the Commission's finding that Section 255 applies to CPE that physically includes software from the CPE manufacturer. NPRM ¶ 56. Microsoft supports the Commission's finding that Section 255 does not apply to unbundled software or software bundled with CPE that is not made or branded by the same. Any other interpretation would create a slippery slope of regulation that would undoubtedly and ultimately stifle the very creativity that has produced the many accessibility software features available today and that are being continually improved upon.

In addition, Microsoft supports the Commission's finding that Section 255 does not apply to information services such as e-mail and Internet access. NPRM ¶ 36. In recognition of the developing nature of such services, Congress has intended that they remain outside the Commission's jurisdiction. There is still much to do on the accessibility front. However, it is

⁴ Microsoft endorses laws that promote marketplace competition and innovation, such as Section 508 of the Rehabilitation Act, which create commercial incentives to produce accessible products.

important not to lose sight of the progress already made or of the fact that even well-intended government intervention may have unintended consequences if it is overly intrusive.

A. SECTION 255 HAS, AT MOST, ONLY A LIMITED APPLICATION TO SOFTWARE.

Microsoft shares the concerns expressed by the Business Software Alliance (BSA) and others as to whether Section 255 applies to software that is part of customer premises equipment. *See, e.g.*, BSA Comments at 8-9. Assuming for this Reply that the Commission's discussion of its authority under Section 255 is correct, Microsoft joins with these commenters in suggesting that this regulatory power would extend, if at all, only to the circumstance where a manufacturer bundles its equipment with its own branded software for use in or with its CPE. *See* NPRM ¶ 56. Microsoft strongly supports the Commission's finding that where software to be used with CPE is marketed separately from the CPE, and not as an add-on by the manufacturer, or is bundled with CPE from a different manufacturer, the software should not be considered CPE subject to Section 255. *Id.*

As the Commission notes, although Congress explicitly included in its definition of "telecommunications equipment" software "integral" to the equipment, Congress did not do so with respect to CPE.⁵ NPRM ¶ 56. Therefore, as Microsoft has stated previously, this omission

⁵ Section 255(b) states that "[a] manufacturer of telecommunications equipment or customer premises equipment shall ensure that the equipment is designed, developed, and fabricated to be accessible to and usable by persons with disabilities, if readily achievable." 47 U.S.C. § 255(b). The Communications Act defines "telecommunications equipment" as "equipment . . . used by a carrier to provide telecommunications services, and includes software integral to such equipment (including upgrades)." 47 U.S.C. § 153(45). By contrast, the Act defines "customer premises equipment" (CPE) as "equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications." 47 U.S.C. § 153(14). As the Commission acknowledges, the definition of CPE makes no mention of software. *See* NPRM ¶ 56. Microsoft therefore shares the concerns expressed by BSA about the Commission's authority over software "integral" to CPE. *See* BSA Comments at 8-9.

could be interpreted as evidence of Congress' intent that Section 255 not apply to software integral to CPE. *See* Microsoft Comments on Notice of Inquiry at 10-11. *See also* BSA Comments at 9. But even if this were not the case, Congress' omission of software from the CPE definition certainly dictates that the application of the CPE definition to software is no broader, if not more limited, than that of the "telecommunications equipment" definition.

Thus, subject to the points above, Microsoft believes that the Commission's proposed application of the CPE definition to software is appropriate. Moreover, the formulation described by the Commission is the least burdensome and easiest to administer alternative. As BSA observes, Congress and various Commissioners have argued that that the "FCC" should not become the "Federal Computer Commission." BSA Comments at 8. The Commission's proposed formulation is consistent with this philosophy, as it will allow software manufacturers to continue to create accessibility features without the added expense and delay associated with governmental engineering.

In addition, through the measured application of Section 255 to software described in the NPRM, the Commission will ensure that the party with final responsibility for the production of the CPE – the equipment manufacturer – has responsibility for ensuring that the CPE's software does not interfere with the CPE's accessibility. Where a software manufacturer creates software specifically for a particular piece of customer premises equipment, the CPE manufacturer can ensure via contract that the software will not inhibit the equipment's accessibility features. Government regulation is unnecessary.

Despite the elegance of the Commission's proposed interpretation of Section 255, several commenters have taken issue with this interpretation, urging the Commission to apply Section 255 to potentially all software associated with CPE, bundled and unbundled, regardless of

whether it is made by the same manufacturer as that of the CPE. *See, e.g.,* Universal Service Alliance Comments at 6-7; National Association for the Deaf Comments at 18-19. Such a broad reading of the FCC's authority under Section 255 would place the Commission in the software business, regulating the minutiae of hundreds of applications that might possibly interact with CPE.

Similarly, some commenters have suggested that the Commission assert its authority over *any* software that allows CPE to perform a "telecommunications function."⁶ But such a boundless reading of Section 255 arguably could include virtually all software used in conjunction with CPE, contradicting Congress' clear intent to limit the Commission's authority over software. The Commission's statutory authority to draft rules governing CPE should not be used to cast a regulatory net over all software that is interoperable with CPE.

B. THE COMMISSION PROPERLY CONCLUDED THAT SECTION 255 DOES NOT AUTHORIZE FCC REGULATION OF INFORMATION SERVICES.

Section 255 applies to telecommunications services, as that term is defined in the Communications Act.⁷ However, under the long-standing *Computer II* framework⁸, services like

⁶ *See, e.g.,* National Association for the Deaf Comments at 18; National Council on Disability Comments at 5-6 (raising possibility of operating system being subject to Section 255); President's Committee on Employment of People with Disabilities Comments at 9.

⁷ "Telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information sent and received." 47 U.S.C. § 153(43). The term "telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used." *Id.* at § 153(46).

⁸ *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, Tentative Decision and Further Notice of Inquiry and Rulemaking, 72 FCC 2d 358 (1979), 77 FCC 2d 384 (1980), *on recon.*, 84 FCC 2d 50 (1980), *on further recon.*, 88 FCC 2d 512 (1981), *aff'd sub. nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

electronic mail, interactive voice response, and voice mail, are considered “information services” and therefore not subject to Title II regulation. *See* NPRM ¶ 38 (citing cases). Microsoft therefore joins in the numerous comments submitted in this proceeding supporting the Commission’s conclusion that information services are similarly not covered by Section 255. *See, e.g.,* AT&T Comments at 4; Cellular Telecommunications Industry Ass’n Comments at 11-12; SBC Communications, Inc. Comments at 2-4.

The Commission recently reaffirmed the distinction between information services and telecommunications services under the Communications Act. In its *Report to Congress* in the Universal Service proceeding, the Commission reviewed the legislative history of the definitions of “telecommunications service” and “information services,” concluding that, in enacting the 1996 Act, Congress intended “that the two categories be separate and distinct and that information service providers not be subject to telecommunications regulation.” *Report to Congress, In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 98-67 (April 10, 1998) (“*Report to Congress*”). The Commission found no evidence that Congress intended to overturn the *Computer II* framework and that FCC regulation of information services could “seriously curtail the regulatory freedom that the Commission concluded in *Computer II* was important to the healthy and competitive development of the enhanced-services industry.” *Id.* at ¶ 46.

These findings remain true in the Section 255 context. Nevertheless, although information services like electronic mail are not subject to Section 255, Microsoft has and will continue to voluntarily incorporate accessibility features into its software to maximize the accessibility of many of these services.

CONCLUSION

Microsoft hopes that these reply comments will be helpful to the Commission and that the actions of the Commission will take our reply into account.

Respectfully submitted,

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August 14, 1998